United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 19, 1996

TO : Elizabeth Kinney, Regional Director
Region 13

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Construction & General Laborers
Local Union 4
(Quality Restorations)
Case 13-CC-2006

560-7540-2080
560-7540-2080-2500
560-7540-2080-5000

This case is submitted for advice on the issue of whether the Union violated Section 8(b)(4)(ii)(B) of the Act when, following about 5 months of area standards picketing, it stationed a person dressed as a rat in front of the main entrance of a neutral employer's building.

FACTS

400 Condominium Association manages a high-rise apartment building located at 400 East Randolph Street in Chicago. It entered into an agreement with Quality Restorations (the Employer) to refurbish concrete balconies on the outside of the building. This work consists primarily of demolishing deteriorated concrete, pouring new concrete and installing new railings. The Employer began this work on about May 1, 1995, and has had about four to six laborers performing work on the site. Those employees are represented by and covered by a current contract with the Congress of Independent Unions (a labor organization).

On about May 1, 1995, Construction & General Laborers Union Local 4 (the Union) began area standards picketing at the building directed at the Employer. The pickets were accompanied by a man wearing a rat suit. The Employer then established a reserved gate system. On the west side of the building, it placed a sign stating that this entrance was reserved for the Employer, its employees, suppliers and subcontractors. On the east side of the building, it placed a sign by a side door stating it was for the use of neutral employees and contractors performing work in the building unrelated to the balcony work. The building is about 200' wide facing Randolph Street. In the middle front of the building, between the reserved gates (the gates are on the sides of the building), is a double set of revolving doors

for the use of building employees, tenants and guests. The revolving doors are about 100' from each of the reserved gates. When the entrance for the Employer was established, the pickets moved to that entrance, but the rat continued to patrol on the sidewalk, patrolling about 50' to either side of the public entrance to the building. The rat initially either carried a picket sign or wore a picket vest, but apparently ceased doing so in about late May, 1995. During May 1995, the Union also parked in front of the building, a trailer containing a large inflatable rat but that conduct also ceased by about late May 1995. While the pickets and rat initially distributed area standard handbills, there is no evidence to show that handbills have been distributed during any time relevant to the instant matter.

The evidence shows that the Employer was not paying its laborers wages and benefits equal to the area standards of the Union. However, by letter dated October 19, 1995, the Employer informed the Union that effective October 23, 1995, all of the Employer's employees would have their wages and benefits increased to the Union's area standard (reflected in paychecks received November 3, 1995). The last full day of picketing was Friday, October 20, 1995. No work was performed so no pickets were present on Saturday and Sunday, October 21 and 22, 1995. On Monday, October 23, 1995, the pickets and rat were present for about one hour and then left. According to the Employer, the man in the rat suit stated that they were leaving because they received the letter (from the Employer). Although the pickets left, the rat has been present since October 24, 1995. The rat carries no sign and does not display any message. It is simply a man wearing a rat suit (or in warm weather only carrying the large rat head) who walks back and forth in front of the public entrance between about 7:30 a.m. and 4:00 p.m. The area of his patrol is about 50' on either side of the public entrance in the middle of the building, so it extends to within about 50' of each of the reserved gates.

On October 25, 1995, MWS Enterprises, a subcontractor to the Employer, was scheduled to begin installation of railings by two iron worker employees. The Employer claims that when the two iron workers arrived at the site and walked towards the Employer's gate, the rat approached them and said he would call their Union business agent if they went to work. [*FOIA Exemptions 6, 7(c)and (d)*

.] The two MWS Enterprise iron workers did refuse to work on October 25, 1995, but did work on October 26 and 27, 1995. In its position statement, the Union's attorney states that on October 25, 1995, the two iron

workers approached the man in the rat suit and asked if the Union was still picketing, to which the man in the rat suit responded, "No, they have the rat instead."[1] To date the rat has continued to patrol only in front of the public entrance and there is no evidence of any other effect from his presence.

ACTION

Complaint should issue, absent settlement, alleging that the Union violated Section 8(b)(4)(ii)(B) of the Act when, following about 5 months of picketing which included a picket in a rat suit, it stationed a person dressed as a rat who patrolled in front of the main entrance of a neutral employer's building.

Section 8(b)(4)(i) and (ii)(B) makes it unlawful for a labor organization or its agents (1) to induce or encourage employees to withhold services from their employer, or (2) to threaten, coerce, or restrain any person where an object is for that person to cease doing business with another employer. This provision reflects the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own." NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 692 (1951).

However, Section 8(b)(4) proscribes more than just picketing. It prohibits all conduct where it was the union's intent to coerce, threaten or restrain third parties to cease doing business with the neutral employer, or to induce or encourage its employees to stop working, although this need not be the union's sole objective.[2]

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[1] The Region has determined that this statement constitutes an inducement in violation of Section 8(b)(4)(i)(B) by an agent of the Union.

[2] Denver Bldg. & Constr. Trades Council, 341 U.S. at 688-89. See also NLRB v. Fruit and Vegetable Packers, Local 760, 377 U.S. 58, 68 (1964) (whether a particular activity is prohibited by Section 8(b)(4) depends upon the "coercive nature of the conduct, whether it be picketing or otherwise"); Pye v. Teamsters, Local 122, 875 F. Supp. 921, 927 (D. Mass. 1995) ("Coercion can take many forms and is often most effective when it is very subtle").

An unlawful intent may be inferred from the "foreseeable consequences" of the union's conduct,[3] the nature of the acts themselves,[4] and from the "totality of the circumstances."[5] The Board has found many types of conduct to be "coercive"[6] even though they did not involve any strike or picketing activity.[7]

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[3] NLRB v. Retail Store Employees, Local 1001 v. NLRB, 447 U.S. 607, 614 n.9 (1980); UMW, District 29 (New Beckley Mining Corp.), 304 NLRB 71, 73 (1991), enf'd, 977 F.2d 1470 (D.C. Cir. 1992).

[4] IBEW, Local 761 v. NLRB, 366 U.S. 667, 674 (1961) (quoting Seafarers Int'l Union v. NLRB, 265 F.2d 585, 591 (D.C. Cir. 1959)).

[5] New Beckley Mining, 304 NLRB at 73; See also Plumbers, Local 32 v. NLRB, 912 F.2d 1108, 1110 (9th Cir. 1990).

[6] "Coercion" is defined as a disruption of the neutral employer's business. NLRB v. Local 825, Operating Engineers, 400 U.S. 297, 304-05 (1971). See also Carpenters, Kentucky State Dist. Council (Wehr Constr., Inc.), 308 NLRB 1129, 1130 n.2 (1992) ("'coercion' means 'non-judicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or other economic retaliation or pressure in a background of a labor dispute.'" (quoting Sheet Metal Workers, Local 48 v. Hardy Co., 332 F.2d 682, 685 (5th Cir. 1964)).

[7] See, e.g., Sheet Metal Workers, Local 80 (Limbach Co.), 305 NLRB 312, 314-15 (1991) (disclaimer of interest in representation and cancellation of Section 8(f) agreement with unionized company in order to obtain representation of non-union related company), enf'd in pertinent part, 989 F.2d 515 (D.C. Cir. 1993); United Scenic Artists, Local 829 (Theater Techniques, Inc.), 267 NLRB 858, 859 (1983) (threatening employer with monetary fine for not acquiring union work), enf. denied, on other grounds, 762 F.2d 1027 (D.C. Cir. 1985); Hospital and Service Employees Union, Local 399 (Delta Airlines, Inc.), 263 NLRB 996, 999 (1982) (newspaper advertisement raising safety concerns about travel on air carrier), enf. denied, 743 F.2d 1417 (9th Cir. 1984); Carpenters, Local 742 (J.L. Simmons Co.), 237 NLRB 564, 565 (1978) (demand for premium pay in order to make up for lost work by use of prefabricated doors); Ets-Hokin Corp., 154 NLRB 839, 842 (1965) (threat to cancel collective bargaining agreement due to employer's non-union subcontracting), enf'd, 405 F.2d 159 (9th Cir. 1968). See

In DeBartolo Corp. v. Florida Building & Construction Trades Council (DeBartolo II), 485 U.S. 568, 128 LRRM 2008 (l988), the Supreme Court held that Section 8(b)(4)(ii)(B) of the Act does not proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer. The Court stated that mere persuasion of customers not to patronize neutral establishments does not thereby coerce the establishments within the meaning of Section 8(b)(4)(ii). In so doing, the Court noted that "there would be serious doubts about whether Section 8(b)(4) could constitutionally ban peaceful handbilling not involving non-speech elements, such as patrolling." 128 LRRM at 2004. Thus, because of First Amendment considerations, the Court interpreted the phrase "threaten, coerce or restrain" with "'caution'" and "'not with a broad sweep'" to exclude non-picketing activities partaking of free speech.[8]

In contrast to handbilling, picketing is usually entails a patrolling of the facility or location involved, and is aimed at inducing those who approach the location of the demonstration to take some sympathetic action, e.g., to decide not to enter the facility involved. It is this patrolling/picketing which provokes people to respond without inquiring into the ideas being disseminated and which distinguishes picketing from handbilling and other forms of communication.[9]

The presence of picket signs or patrolling is not a sine qua non for a determination that activity should be considered tantamount to picketing.[10] Thus, confrontational

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also Pye, 875 F. Supp. 921 ("affinity group shopping" where large numbers of union members appeared at store, used parking spaces, and made numerous small purchases with large bills).

[8] Id. at 2005-2006, quoting NLRB v. Drivers, 362 U.S. 274, 290 (1960).

[9] See, e.g., District 1199, National Union of Hospital & Health Care Employees (South Nassau Communities Hospital), 256 NLRB 74, 75 (1981); District 1199, National Union of Hospital & Health Care Employees (United Hospitals of Newark), 232 NLRB 443, and authorities cited therein (1977), enfd. 84 LC para. 10826, No. 77-2474 (3d Cir. August 11, 1978).

[10] Lawrence Typographical Union No. 570 (Kansas Color Press, Inc.), 169 NLRB 279, 283 (1968), enfd. 402 F.2d 452 (10th Cir. 1965).

conduct is also coercive under 8(b)(4)[11]. In Stoltze Lumber, supra, for example, unlawful "picketing" was found where the union was engaged in confrontational handbilling. The decision states:

> The important feature of picketing appears to be the posting by a labor organization or by strikers of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business.

Based on the above, we conclude that the Union's posting of the rat who patrolled the entrance[12] to the neutral's luxury condominium is not protected, non-picketing activity. Rather, the Union's patrolling constitutes picketing. Here, as in Stoltze Lumber, it is clear that the purpose in posting the individual dressed as a rat who patrolled in front of 400 Condominium Association was to confront either customers or employees or prospective employees of the neutral employers (i.e., the condominium and other contractors), rather than to engage in protected Free Speech activity.

First, the rat has been present with union picketers for 5 months and initially carried a picket sign or wore a picket vest. Thus, the rat was clearly associated with Union picketing. Second, on October 25, two iron worker employees employed by a subcontractor of the Employer approached the premises, spoke to the rat, and immediately left, refusing to work. The Union admits that the iron workers asked the rat if the Union was still picketing and that the individual in the rat suit replied "No, they have rat instead". Without regard to whether this statement violates Section 8(b)(4)(i)(B) in and of itself,[13] the

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[11] Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666, 1669 (1965). See also Lumber & Sawmill Workers Local Union No. 2797 (Stoltze Land & Lumber Co.), 156 NLRB 388, 394 (1965)(discussing the meaning of "patrolling" in the context of Section 8(b)(7)(C)).

[12] The main entrance is used by the neutral condominium employers and tenants. Also, it appears that the patrolling was visible to those entering the neutral gate on the east side of the building.

[13] The Region has concluded that this statement constitutes an inducement in violation of Section 8(b)(4)(i)(B). The

statement is evidence that the Union intended the rat patrol to give the impression of picketing and accomplished that objective when the iron workers refused to work. And finally, the rat is patrolling within 50 feet of each of the reserved gates which gives the appearance that the Union is still picketing the site. Indeed, as noted above, the rat, by its presence and its statements, turned away the iron workers who were scheduled to work, which delayed completion of the neutral's work.

All of the above circumstances creates the necessary confrontation which is coercive. If the Union does not intend such a result, it is obligated to clarify its objective given the fact that all the surrounding circumstances give the clear impression that the Union is continuing to picket. Thus, there is sufficient evidence to warrant issuance of complaint alleging that the presence of the rat who continues to patrol in front of the neural Employer's building is a continuation of the prior picketing, in violation of Section 8(b)(4)(ii)(B). However, the wearing of the rat suit in and of itself, i.e, in the absence of patrolling, is not a violation of the Act. Therefore, once the Union dissociates the rat's activity from picketing, the Union can station a person dressed as a rat to stand in front of the Employer's building, as long as the rat does not patrol or otherwise engaged in picketing activity.[14]

B.J.K.

Supreme Court had defined (i) inducement to include "every form of influence and persuasion." Intl. Brotherhood of Electrical Workers v. NLRB (Samuel Langer), 341 U.S. 694, 701-702 (1951).

[14] [*FOIA Exemption 5*

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